



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2004

Mr. Michael J. Westergren
In House Counsel
Del Mar College
101 Baldwin
Corpus Christi, Texas 78404-3897

OR2004-9374

Dear Mr. Westergren:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 212303.

The Del Mar College District (the "district") received a request for eight categories of information relating to the requestor, several other named individuals, and related matters. You inform us that the district has released most of the requested information. You have submitted other responsive information that you claim is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is protected by other statutes. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health

information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See* Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

Section 552.101 incorporates the federal Family and Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We have marked information that the district must withhold under section 552.101 in conjunction with the FMLA.

Section 552.101 also protects information that is made confidential under Title I of the Americans with Disabilities Act of 1990 (the “ADA”). Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a “fitness for duty examination,” conducted to determine whether an employee is still able to perform the essential functions of his or her job, also is to be treated as a confidential medical record. *See* 42 U.S.C. §§ 12101 *et seq.*; 29 C.F.R. § 1630.14(c); Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the “EEOC”) has determined that medical information for the purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked information that the district must withhold under section 552.101 in conjunction with the ADA.

Next, we address your claim under section 552.101 in conjunction with the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code.¹ FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). In this instance, the submitted information includes a transcript created by another educational institution. FERPA also provides that an educational agency or institution may only transfer personal information to a third party, such as the district, “on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.” *Id.* § 1232g(b)(4)(B). The federal regulations adopted under FERPA provide that a third party

¹Section 552.026 incorporates FERPA into the Act. *See* Gov’t Code § 552.026 (Act does not require release of information contained in education records of educational agency or institution, except in conformity with FERPA).

that receives such information from another educational agency or institution may use the information only for the purposes for which the disclosure was made. *See* 34 C.F.R. § 99.33(a)(2). We are unable to determine whether the district received the transcript in question directly from the other educational institution. Nevertheless, if the district received the transcript that we have marked directly from the other educational institution, then under sections 1232g(b)(4)(B) and 99.33(a)(2) the district may only release the transcript upon the consent of the individual to whom it pertains. If the district did not receive this transcript directly from the other educational institution, then the transcript may not be withheld under FERPA.

Section 552.102 excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]”² Gov’t Code § 552.102(a). This exception is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor). Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has concluded that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We conclude that the district may not withhold any of the remaining information under sections 552.101 or 552.102 in conjunction with common-law privacy.

In summary: (1) the district must withhold the marked information that is confidential under section 552.101 in conjunction with the FMLA; (2) the district also must withhold the

²We note that the district has submitted no arguments in support of its claim under section 552.102. *See* Gov’t Code §§ 552.301(e)(1)(A), .302. Nevertheless, we will address the applicability of this exception to the remaining information, as section 552.102 is a mandatory exception and may not be waived. *See id.* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

marked information that is confidential under section 552.101 in conjunction with the ADA; and (3) if the district received the marked transcript directly from the other educational institution, then under FERPA the district may only release the transcript upon the consent of the individual to whom it pertains. All information that is not excepted from disclosure under section 552.101 in conjunction with the FMLA, the ADA, or FERPA must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

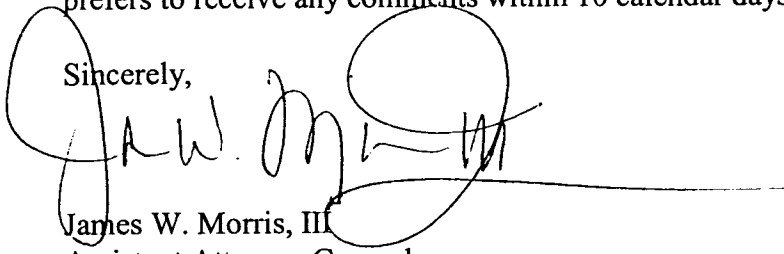
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 212303

Enc: Submitted documents

c: Ms. Karen D. Huegler
c/o Mr. Michael J. Westergren
Del Mar College
101 Baldwin
Corpus Christi, Texas 78404-3897
(w/o enclosures)